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IN THE COURT OF APPEALS OF INDIANA

RICHARD TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0609-CR-513
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0511-FA-506

April 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

After pleading guilty to class A felony rape and class B felony criminal confinement, Richard Turner appeals, contending that he was improperly sentenced without a written presentence report. We affirm.

Facts and Procedural History

On or about February 1, 2003, Turner had sexual intercourse with sixteen-year-old A.S. while he held a knife to her throat, and he confined her against her will while armed with the knife. Appellant's App. at 6, 8; Tr. at 15. A DNA match led to class A felony rape and class B felony confinement charges being filed against Turner on November 8, 2005. App. at 6-8. Turner, who was already incarcerated on unrelated charges, was uncooperative at his November 18, 2005 initial hearing on the matter. Tr. at 3-9.

On June 12, 2006, the court held a dispositional hearing during which the following colloquy occurred:

> DEFENSE COUNSEL: Judge, the agreement is that [Turner] will plead guilty to Count I, as charged and Count II, as charged. That the sentences would run concurrent with sentence being open to Court. The agreement is that if he enters his plea today, there will be no habitual charge filed against him and *at [Turner's] request, he is going to waive any update of the Pre-Sentence report and would like to be sentenced today. Is that right [Turner]*?
> [TURNER]: *Yes.*
> DEFENSE COUNSEL: So based on those considerations, Judge, he's prepared to plead to count I and II.
> STATE'S COUNSEL: The only other provision, Judge, is that this case will be consecutive with –
> DEFENSE COUNSEL: I . . .
> STATE'S COUNSEL: -- the sentence that he's serving now. I don't know if he said that or not so.
> DEFENSE COUNSEL: No.
> STATE'S COUNSEL: Okay.
> DEFENSE COUNSEL: And you're actually right.

> [COURT]: Mr. Turner, you said you agreed with – you agree with that, sir?
> [TURNER]: Yes.

App. at 23-25 (emphases added).

Accordingly, the court accepted Turner's guilty plea and asked the State for its sentencing recommendation. When the State requested fifty years, the court asked if "prior criminal history" was the reason for the aggravation. *Id*. at 30. This exchange followed:

> STATE'S COUNSEL: Aggravation is prior and post criminal history, Judge. [Turner] had a long history beginning in 1986, has a juvenile criminal mischief, truancy, a battery. *I should say for the record, we have a pre-sentence investigation that was created October 11th of 2005 in connection with a case that he was sentenced on in Delaware County. So I don't know if that was part of the record or if we could make it part of the record. But the State would make that request.* Criminal history . . .
> COURT: *Any objection to that being part of the record?*
> DEFENSE COUNSEL: *No, Your Honor, because my client would like to go ahead with sentencing today. I think that's necessary for the court's consideration.*
> STATE'S COUNSEL: And it's a little bit unusual Judge. Maybe we can make some record from the defendant . . . .
> [DEFENSE COUNSEL]: [Turner], you and I discussed this briefly today and you've decided you were going to plead guilty with the agreement that we have, is that correct?
> [TURNER]: Yes.
> [DEFENSE COUNSEL]: And one of the things you insisted on is you don't want to come back and you asked the Court to sentence you today?
> [TURNER]: yes . . . indiscernible . . .
> [DEFENSE COUNSEL]: *So you're waiving any rights you'd have for me to prepare for the Pre-Sentence, to get a new pre-sentence, to prepare for that, to present any witnesses on your behalf. I might has[sic] you a few questions but you want to proceed today knowing all that. You don't think that would benefit you and you want the Judge to sentence you today?*
> [TURNER]: *Yes*.
> [DEFENSE COUNSEL]: Is that right?
> [TURNER]: Yes, sir.
> [DEFENSE COUNSEL]: Okay.
> STATE'S COUNSEL: Thank you, Judge.

Id. at 30-32 (emphases added).

Thereafter, the State was permitted to set out Turner's criminal history:

That said, the criminal history is the primary aggravation here on several different levels. First of all, his juvenile history is extensive. It starts in '86 with criminal mischief, '91 truancy and battery, '91 criminal conversion, and the PSI sets out the disposition on these. These are the contacts with the Court. Criminal mischief in '91, intimidation in '91, incorrigibility in '92, auto theft in '92, formal charges never filed, fleeing lawful detention that was in '92. This appears to be his first felony adjudication, in February of '93 . . . . '93 runaway, '93, reckless driving, '93 intimidation, truancy, operating without a license, speeding, battery in '94. His second felony contact with the Court was in '94 that was theft, battery, recklessness case which was dismissed in juvenile court as a waiver was filed into adult court. The same thing on escape that was filed in '94 and an auto theft that was filed in '94 and a 2nd escape appears in '94 as well. His adult history begins in, significant adult history, begins in '94 carrying a handgun, dangerous possession of a handgun, carrying a handgun without a license and that count was eventually dismissed. It appears 'cause he plead guilty to other cases. December of '94, escape as a Class C felony, that was his first adult felony conviction. Resisting law enforcement and false reporting, guilty plea in '99, misdemeanor, auto theft in Kentucky, carrying a handgun as a felony in '97, in Evansville, Indiana. That was a – there's still an active warrant as of October 11th of 2005 on that case. Resisting law enforcement and auto theft, he plead guilty to resisting on that case. '98 auto theft and theft, in '98 he plead guilty to theft in that case, possession of stolen auto parts in '98 so I think we're up to four (4) or five (5) felony convictions at that time, went to prison in Henderson, Kentucky for a year and a half on a theft felony conviction there. Actually, there were two (2) separate case[s] it appears there. Receiving stolen auto parts, [Turner] plead guilty to receiving stolen auto part as a D felony and driving while suspended in 2000. Additional contacts with the Court in 2002, four (4) or five (5) convictions, failure to return to lawful detention February of 2001, 2001. Just a consistent felony history by [Turner] up through February 2003 when he commits this offense. Obviously, initially, is – is not caught and then in July 2003 he commits an offense in Delaware County including Rape as a class A felony. Child molesting times two (2) as a class A felony, burglary as a B felony times four (4), criminal confinement as a class C felony, and forgery as a class C felony with multiple victims and multiple counts and he was sentenced on that after a jury trial, I don't know what his aggregate sentence is but he's – he's in the Department of Correction and with an earliest possible release date of 2139.[1]

Id. at 32-35.

In arguing for a reduced sentence, defense counsel noted that Turner's "record is what it is," but pointed out that his guilty plea saved time and money as well as spared the victim from having to testify. *Id*. at 37. Turner, who was twenty-seven years old at that time, testified that he has been attending college during his incarceration. *Id*. at 8, 36. The court "adopt[ed] the aggravation as espoused by the prosecutor and enhance[d] the sentences on Count I to fifty (50) years and Counts II to twenty (20) years, all executed, concurrent with each other, consecutive to the current sentences." *Id.* at 38.

Discussion and Decision

On appeal, Turner asserts that the court violated Indiana Code Sections 35-38-1-8(a) and 35-38-1-12(b) by sentencing him "without a written pre-sentence report." Appellant's Br. at 1, 5, 6. He maintains that a defendant is entitled to a copy of a pre-sentence report, or statement of its factual contents, "sufficiently in advance of sentencing so that the defendant will be afforded a fair opportunity to controvert the material included." Appellant's Br. at 6 (citing Ind. Code § 35-38-1-12(b) and *May v. State*, 578 N.E.2d 716, 724 (Ind. Ct. App. 1991)). In addition, he argues that *Mejia v. State*, 702 N.E.2d 794, 798 (Ind. Ct. App. 1998), and *Hinton v. State*, 272 Ind. 297, 397 N.E.2d 282 (1979), require us to remand his case for resentencing. We disagree.

As we begin our analysis, we note that the peculiar facts of this case do not fit neatly within any previously decided case. Notwithstanding that acknowledgement, an overview of

[1] There is some discrepancy in the transcript as to whether Turner's release date could be 2136. This

the law regarding presentence reports still provides guidance in the ultimate resolution of Turner's case.

Indiana Code Section 35-38-1-8 states that a "defendant convicted of a felony may not be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court." "The code requires that this report contain information on the present crime, the impact of the crime on the victim (including statements submitted by the victim), the convicted person's criminal history, social history, employment history, family situation, economic status, education, and personal habits, and any other matters the court requires." *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) (citing Ind. Code §§ 35-38-1-8, 9(b)-(c)), *cert. denied*. Such reports may include any other material the officer deems relevant. *See* Ind. Code § 35-38-1-9(c). "The Legislature has provided for the making of pre-sentence reports in order to assist the judge in individualized sentencing," that is, so the court has the necessary information to fashion an appropriate sentence. *Yates v. State*, 429 N.E.2d 992, 994 (Ind. Ct. App. 1982).

The court "provides the completed report to the defendant and the defendant's lawyer, who have the opportunity to contest its accuracy." *Ryle*, 842 N.E.2d at 323 (citing Ind. Code § 35-38-1-12). Not surprisingly, the relevant inquiry regarding pre-sentence reports often concerns "whether the defendant had an opportunity to examine the report and challenge any inaccuracies, pursuant to I.C. 35-38-1-12(b)." *Idle v. State*, 587 N.E.2d 712, 714 (Ind. Ct. App. 1992), *trans. denied*; *see also May*, 578 N.E.2d 716.

Having a presentence report considered prior to sentencing is a privilege granted by

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has no effect upon our resolution of the issue raised on appeal.

the legislature, not a fundamental right. *See Smith v. State*, 432 N.E.2d 1363, 1373 (Ind. 1982). Therefore, the failure to consider such a report does not necessarily require reversal. For instance, over thirty years ago, our supreme court held that a court unquestionably committed error by sentencing a defendant "without first reviewing a precommitment investigation report[.]" *Loman v. State*, 265 Ind. 255, 260-61, 354 N.E.2d 205, 209-10 (1976). However, the *Loman* court concluded that the error was harmless and explained its rationale as follows:

> The Appellant's sentence was mandated by the rape statute in effect at the time of his sentencing, as it is required under our current rape statute. Under the statutory provisions in effect at that time, as today, this sentence could not be suspended. *The statutory requirement of a pre-commitment investigation report does not rise to the level where a mistrial will result if it is not followed. The most that the Appellant could ask for here is a vacating of his order of commitment and resentencing in light of such a report. This would serve him nothing*, since the trial court has no discretion in the sentence in this case.
>
> The only purpose to be served by the pre-commitment investigation report in this case would be to aid prison officials in proper placement, future work assignments, and parole applications. *Cf. Robb v. State*, (1970) 253 Ind. 448, 255 N.E.2d 96. The Appellant has presented no evidence which would suggest that prison officials, during the course of his imprisonment since 1960, have not accumulated records sufficient for these purposes. *We see nothing to be gained by a belated pre-commitment report at this point in time*.

Id., 265 Ind. at 261-62, 354 N.E.2d at 210 (some citations omitted) (emphases added).

Moreover, inaccuracies within a presentence report do not necessarily constitute reversible error. *See Malone v. State*, 660 N.E.2d 619, 632-33 (Ind. Ct. App. 1996) (concluding that where defendant had "numerous [other] criminal convictions to support the imposition of an enhanced sentence," new sentencing hearing not warranted – despite inaccuracies within presentence report), *trans. denied*, *overruled on other grounds by Winegeart v. State*, 665 N.E.2d 893 (Ind. 1996). Similarly, a sparse presentence report does

not automatically merit reversal. *See Idle*, 587 N.E.2d at 714.

Further, "the failure to include the pre-sentence report in the record does not, standing alone, constitute reversible error." *Carter v. State*, 468 N.E.2d 212, 213 (Ind. 1984) (affirming sentence where record demonstrated that pre-sentence report was prepared and that the trial court considered it in determining the sentence); *cf*. *Mejia*, 702 N.E.2d at 798 (remanding for resentencing where no written report was included in the record on appeal; record referred "only to an oral presentence report having been given;" *and defendant had not personally agreed to use of an oral presentence report*).

We now review the rather unusual facts in Turner's case. No presentence investigation report is included in the materials presented on Turner's appeal. Indeed, there is no evidence that a brand new presentence investigation report was completed. Rather, the lengthy excerpts from the transcript reveal the following. A presentence report was completed on October 11, 2005, in connection with a separate case against Turner in another county. Turner "insisted" that he be sentenced on June 12, 2006, and to that end, "request[ed]" that he be allowed to "*waive* any update of the [October 11, 2005] Pre-Sentence report[.]" (emphasis added). The prosecutor confirmed that it had the eight-month-old presentence report and requested that it be made a part of the record. When the court inquired whether Turner had any objection to that, Turner's counsel not only did not object, but stated, "No, Your Honor, because my client would like to go ahead with sentencing today. I think that's necessary for the court's consideration." To further confirm that those were truly his client's wishes, Turner's counsel asked:

Q. So you're waiving any rights you'd have for me to prepare for the Pre-

> Sentence, to get a new pre-sentence, to prepare for that, to present any witnesses on your behalf. . . . you want to proceed today knowing all that. You don't think that would benefit you and you want the Judge to sentence you today?
> A. Yes.
> Q. Is that right?
> A. Yes, sir.

Thereafter, in arguing for aggravated sentences, the prosecutor provided the details of what it deemed "maybe the worst criminal history that I've ever seen." App. at 36. At the conclusion of the recitation of Turner's vast criminal history, Turner had the opportunity to respond. He briefly testified about attending college while incarcerated. He did not object to or in any way challenge any representation regarding his criminal history, nor did he claim not to have received the October 2005 report. Referring to Turner's criminal history, his counsel simply stated, "His record is what it is." The court utilized Turner's staggering criminal history to support its decision to aggravate his sentence.[2]

Given these particular circumstances, we conclude that the record is "incomplete" regarding a presentence report. *See Hinton*, 272 Ind. at 300, 397 N.E.2d at 284. However, we find it "adequate to show" that a recent report existed, that Turner personally indicated that he did not want an updated report (as it would not be advantageous for him), that he had no qualms with the oral presentation of the eight-month-old report, and that the court clearly considered the contents of the report in sentencing him. *See id*. (affirming sentence regardless of incomplete record regarding presentence report); *cf. Mejia*, 702 N.E.2d at 798 (remanding where defendant had not personally agreed to use of an oral presentence report);

[2] Turner does not dispute that criminal history alone may be sufficient to support a maximum sentence. *See Battles v. State*, 688 N.E.2d 1230, 1235 (Ind. 1997).

see also Carter, 468 N.E.2d at 213 (court clearly considered report). Moreover, it is significant that on appeal, Turner makes no allegation that the State's recitation of his criminal record was in any way inaccurate or that he had not received a copy of the October 2005 presentence report. *See May*, 578 N.E.2d at 724 (finding new sentencing hearing unnecessary where appellant's brief "fails to dispute specifically even a single facet of the presentence report," which was allegedly received by defendant minutes before sentencing).

We further conclude that the better practice would have been to require a "fresh" presentence report – despite Turner's clearly stated preference to the contrary. Nonetheless, in light of the unique situation presented, we conclude that any error in this regard was not only waived, but invited and harmless. *See Loman*, 265 Ind. at 261, 354 N.E.2d at 210; *see also Dilliard v. State*, 827 N.E.2d 570, 577 (Ind. Ct. App. 2005), *trans. denied*.[3] Our conclusion is consistent with the purpose of Indiana Code Section 35-38-1-8, which is to ensure that the sentencing court has before it all the relevant information it needs. *See Carter*, 468 N.E.2d at 213-14. We "see nothing to be gained by a belated [presentence] report at this point in time." *See Loman*, 265 Ind. at 262, 354 N.E.2d at 210.

Affirmed.

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[3] In *Dilliard*, we stated, albeit in a *Blakely* context, "it does not matter why a defendant chooses to remain silent when offered the chance to dispute the accuracy of a presentence investigation report he has had the opportunity to review: the knowing failure to object waives the issue of the report's accuracy for appellate review." 827 N.E.2d at 577. We further noted in *Dilliard* that the defendant did

> not allege there actually were any errors in the criminal history section of his presentence investigation report, but only that there was no competent evidence to support those assertions. We reiterate that *the State's duty to "prove" factual assertions in a more traditional manner is not triggered until the defendant, given the opportunity, disputes the accuracy of those facts. . . . Dilliard declined the opportunity, and therefore waived the issue*.

SULLIVAN, J., and SHARPNACK, J., concur.

Id. (emphasis added).